

W. W. Grainger, Inc. and Miscellaneous Warehousemen, Airline, Automotive Parts, Service, Tire and Rental, Chemical and Petroleum, Ice, Paper, and Related Clerical and Production Employees Union, Local No. 781, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 13-CA-18500

April 20, 1981

DECISION AND ORDER

On April 14, 1980, Administrative Law Judge Stephen Gross issued the attached Decision in this proceeding.¹ Thereafter, the General Counsel filed exceptions and a supporting brief² and Respondent filed a brief in response thereto.

The Board has considered the record and the attached Decision in light of the exceptions and briefs³ and has decided to affirm the rulings, findings,⁴ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The General Counsel has excepted, *inter alia*, to the Administrative Law Judge's dismissal of the 8(a)(1) allegation that Respondent, in interrogating Wayne Jaske and Dean Meretick, failed to provide the protections mandated by *Johnnie's Poultry Co.*⁵

¹ Case 13-CA-18500 came on for hearing before the Administrative Law Judge in consolidation with Case 13-RC-15024. With respect to the representation case, an election was held on May 18, 1979, resulting in a tally of 119 votes for, and 119 votes against, the Union. There were two challenged ballots. There was before the Administrative Law Judge a challenge only to the ballot of Wayne Jaske, the subject of the 8(a)(3) allegation in the instant complaint. After the issuance of the Administrative Law Judge's Decision which included within its recommended Order a disposition of the Jaske challenge, the Board granted the joint request of the Petitioner and the Regional Director to sustain the challenge to Jaske's ballot, sever Case 13-RC-15024 from Case 13-CA-18500, and have the Regional Director issue the appropriate certification of results.

² The Board herein grants counsel for the General Counsel's unopposed "Motion To Include Additional Case Authority" in her brief.

³ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

⁴ We adopt the Administrative Law Judge's dismissal of the 8(a)(1) allegation that Supervisors Dublinski and Owen told employee Altman that union activities were "grounds for termination." In so doing we rely on the Administrative Law Judge's crediting of Dublinski and Owen over Altman. We note, however, that, contrary to the Administrative Law Judge's finding, the record reveals that Owen did not testify that Altman told him that Altman had been threatened by another employee because of his union activity.

We have considered the General Counsel's partial reliance on the small-plant doctrine, *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959), with respect to Respondent's knowledge of Wayne Jaske's union activities. We agree that the small-plant doctrine is applicable to the plant here. However, unlike the situation in *Wiese Plow*, we find the limited union activity of Jaske to be insufficient for us to draw the inference that it was brought to the attention of Respondent's management.

⁵ *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964).

We agree with the General Counsel only with respect to the interrogation of Jaske.

Jaske had been discharged by Respondent on March 1, 1979, and the instant complaint alleging, *inter alia*, a violation of Section 8(a)(3) issued on April 30, 1979. The record reveals that on July 24, 1979, Respondent's attorney, Edwin Thomas, accompanied by Respondent's distribution manager, Joseph Lyon, showed up unannounced and uninvited at Jaske's apartment.

After Thomas and Lyon introduced themselves, Thomas asked Jaske if he could question him about his union activities. Thomas responded to Jaske's refusal by saying that most witnesses were willing to talk to him. Thomas persisted in his efforts to engage Jaske in a discussion about Jaske's union activities. Confronted with Jaske's continued refusal to submit to Thomas' questions, Thomas and Lyon then left. Neither Thomas nor Lyon told Jaske that he was under no obligation to talk to them or that there would be no reprisals if he refused to answer Thomas' questions.

In *Johnnie's Poultry*, the Board held that an employer may interrogate employees on matters concerning their Section 7 rights for the purpose of either verifying a union's claim of majority status or, as here, to prepare a defense for use in an unfair labor practice trial. In balancing this employer privilege against the "inherent danger" to employees of coercion, the Board requires that:

[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

In addressing the applicability of *Johnnie's Poultry*, the Administrative Law Judge correctly noted that Jaske, being a discharged employee seeking reinstatement in a Board proceeding, was a potential employee of his ex-employer. The Administrative Law Judge reasoned, however, that the degree of coercive power an employer may exert over an employee in Jaske's position is considerably less than that available for use against present employees or applicants for employment. Relying on this "difference," the Administrative Law Judge further held that the "full panoply of the *Johnnie's Poultry*

requirements ought not apply" to an interrogation of an alleged 8(a)(3) discriminatee.

We disagree with the Administrative Law Judge. In so doing we recognize that an employer's power to coerce an individual through discharge, threat of discharge, or refusal to hire is clearly more imminent for a current employee or applicant than it is for a discharged employee who *may* be reinstated pursuant to a future Board order. However, we do not view this distinction regarding the timing of potential coercion as sufficient to justify any diminution in the *Johnnie's Poultry* safeguards.

In analyzing Thomas' questioning of Jaske, the Administrative Law Judge listed six factors to support his finding that the questioning was conducted in a lawful manner. We agree with the Administrative Law Judge's findings that Thomas' questions were within the ambit of permissible subjects of interrogation and that Jaske chose, despite Thomas' repeated opportunity, not to respond to any substantive questions. We take issue, however, with the Administrative Law Judge's conclusions drawn with respect to several of the remaining factors.

First, in noting that the questioning took place at Jaske's home, that Thomas and Lyon behaved in an "amicable" manner, and that no threats or promises were made to Jaske, the Administrative Law Judge apparently intended to show that the interrogation was not coercive. However, as the Administrative Law Judge found in section IV of his Decision, Jaske responded to Thomas' repeated requests for information about his union activities by referring to counsel for the General Counsel as "my lawyer" and claiming, falsely, that she had instructed him not to talk to Respondent's representatives. The Administrative Law Judge credited Jaske's testimony that he had made up this story in order to relieve the pressure that Thomas' interrogation was inflicting on him. We agree that Thomas' interrogation of Jaske was violative of Section 8(a)(1) irrespective of any pressure that Jaske may have experienced as a result of the questioning. The Board has long held that the legal standard to be applied in determining whether an interrogation is coercive within the meaning of Section 7 is whether the interrogation may reasonably be said to have a tendency to coerce an employee in the free exercise of his rights under the Act.⁶ We find Thomas' interrogation tended to coerce Jaske and that Respondent therefore violated Section 8(a)(1) of the Act.

Further, the Administrative Law Judge apparently intended to excuse Respondent's failure to extend to Jaske the first two of the *Johnnie's Poultry* safeguards by finding that the purpose of

Thomas' questioning was self-evident and that neither Thomas nor Lyon made any threats or promises to Jaske. However, the thrust of *Johnnie's Poultry* is to impose on an employer an affirmative duty to extend the safeguards. Since Thomas did not directly inform Jaske that no reprisals would be forthcoming or tell him that the purpose of questioning was to prepare Respondent's defense to an unfair labor practice charge, we find that Jaske was not afforded sufficient protection against Thomas' interrogation and that therefore Respondent violated Section 8(a)(1) of the Act.

AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 4 and 5 and substitute the following as Conclusion of Law 3:

"3. By interrogating Wayne Jaske concerning his union activities without providing him with the necessary safeguards, Respondent thereby interfered with, restrained, and coerced him in the exercise of his rights guaranteed in Section 7 of the Act, thus engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act."

THE REMEDY

Having found that Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, W. W. Grainger, Inc., Elk Grove Village, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union activities in a manner which interferes with the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its Elk Grove, Illinois, plant copies of the attached notice marked "Appendix."⁷ Copies

⁶ *El Rancho Market*, 235 NLRB 468 (1978).

⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

MEMBER ZIMMERMAN, dissenting:

The Board today extends the protections enunciated in *Johnnie's Poultry Co.*,⁸ to cover employees who are no longer in the employ of Respondent and whose discharge was lawful. The majority reasons that an employer retains coercive powers over an employee whose discharge is the subject of a pending unfair labor practice charge and who, therefore, might be reinstated pursuant to a future Board order. I find that premise so speculative that it will not support the finding that Respondent violated Section 8(a)(1) in its interrogation of alleged discriminatee Jaske.

The discharge of Jaske has been found lawful. Respondent has been vindicated for its conduct in discharging him. Under those circumstances, I see no justification or statutory authority for requiring it to treat Jaske differently from any other former employee. We are dismissing the 8(a)(1) charges arising from the questioning of former employee Maretick, who voluntarily left Respondent's employ. The charges arising from Jaske's interrogation should be accorded the same treatment.

Were we to find that Respondent had committed an unfair labor practice in discharging Jaske, who would therefore be entitled to reinstatement, a different question might arise.⁹ But that is not the issue presented.

Since I cannot join in the distinction the majority uses to find that Respondent improperly interrogated Jaske, I dissent.

⁸ 146 NLRB 770 (1964).

⁹ Cf. *N.L.R.B. v. Neuhoff Bros.*, 375 F.2d 372, 378 (5th Cir. 1967) (former employee who had applied for reemployment).

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union activities in a manner interfering with the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

W. W. GRAINGER, INC.

DECISION

STATEMENT OF THE CASE

STEPHEN GROSS, Administrative Law Judge: On May 18, 1979, a representation election was held for W. W. Grainger, Inc.'s warehouse workers in the Chicago area. The Union involved in the election was Miscellaneous Warehousemen, Airline, Automotive Parts, Service, Tire and Rental, Chemical and Petroleum, Ice, Paper, and Related Clerical and Production Employees Union, Local No. 781, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union or Local 781.

A total of 238 unchallenged ballots were cast, there were 119 for the Union and 119 against. There is one challenged ballot, Wayne Jaske's. The Board agent challenged Jaske's ballot on the ground that he was not a Grainger employee at the time of the election.¹

All parties agree that Jaske was fired by Grainger on March 1, 1979. But the Union contends that Jaske was discharged for his activities in support of the Union. And there is no dispute that, if that were the case, Jaske's vote should be counted: see, e.g., *Simley Corp.*, 233 NLRB 391, 398 (1977); *Washington Aluminum Co.*, 126 NLRB 1410, 1418 (1960), *enfd.* 370 U.S. 9 (1961).

The General Counsel agrees with Local 781's theory about why Grainger discharged Jaske and alleges that Grainger thereby violated Section 8(a)(3) and (1) of the Act.

¹ See the report on challenged ballots and objections and notice of consolidated hearing, Case 13-RC-15024, G.C. Exh. 1(f). There were originally two challenged ballots: Jaske's and another employee's, whose ballot was challenged by Local 781. The parties have stipulated to sustain the Union's challenge.

In view of the impact that the decision in this proceeding will have on the unionization of Grainger's employees, it is unsurprising that the facts of Jaske's discharge were subjected to extensive examination. The hearing lasted 7 days and 23 witnesses testified. With minor exception all of the testimony was concerned with the circumstances of Wayne Jaske's discharge and the reasons for it.

After consideration of that testimony and the other facts of record, my conclusion is that Grainger did not violate the Act when it discharged Jaske and that the Board agent's challenge of Jaske's ballot accordingly should be sustained.

Respondent W. W. Grainger, Inc., is a wholesale distributor of electrical equipment and related products. Grainger admits that it is engaged in commerce for the purpose of the Act and that Local 781 is a labor organization within the meaning of the Act.

Local 781 filed a charge in Case 13-CA-18500 on March 5, 1979, claiming that Wayne Jaske was discharged because of his union activities. The Acting Regional Director for Regional 13 issued a complaint, based on the charge, on April 30, 1979.² Grainger filed a timely answer denying the substantive allegations of the complaint.

As for Case 13-RC-15024, as discussed earlier, an election was conducted at Grainger on May 18, 1979, under the supervision of the Regional Director for Region 13. A tally of unchallenged ballots showed an equal number cast for and against the Union. There were two challenged ballots.

On July 9, 1979, the Acting Regional Director determined that issues concerning the challenged ballots could best be resolved via a hearing. He therefore consolidated Cases 13-RC-15024 and 13-CA-18500.³ Respondent excepted, but the Board, on August 3, 1979, adopted the Acting Regional Director's findings and recommendations.⁴

The hearing was held on August 13, 14, 15 and September 12, 13, 14, and 17, 1979, in Chicago.

Briefs have been filed by Grainger, by Local 781, and by counsel for the General Counsel.⁵

FINDINGS OF FACT

I. JASKE'S DISCHARGE

A. Summary

Upon leaving work on February 15, 1979, Jaske noticed that a large nail was propped against the tire of his car. The nail was placed so that it would have penetrated the tire if it had been there when Jaske pulled away from his parking space.

² The complaint was subsequently amended to include allegations that a Grainger supervisor made threats against an employee associated with the employee's concerted activities (see G.C. Exh. 1(p)) and that agents of Grainger conducted an improper interrogation of Jaske and another former Grainger employee (see G.C. Exh. 1(mm)).

³ G.C. Exh. 1(f).

⁴ G.C. Exh. 1(cc).

⁵ The General Counsel's motion to correct the transcript is granted in all respects.

Jaske lost his temper. He rushed into the warehouse swinging an ice scraper and "screaming and hollering" threats and obscenities at all members of the oncoming shift in the warehouse in which Jaske worked, including the foreman of that shift. A few minutes later Jaske sought out another supervisor in the warehouse, Martin Audette (who was unaware of Jaske's outburst), and complained about the attempted vandalism.

Grainger management's attention was first directed toward the problem Jaske had raised with Audette—would-be vandalism in the warehouse parking lot. But management's focus subsequently shifted to Jaske's threatening behavior. There is no real dispute that that behavior became the subject of several memoranda, the last of which reached the desk of the most senior Grainger official directly involved in the matter, Joseph Lyon, on February 26.

As of that date Jaske had not been involved in any way with union activity at Grainger. But on February 27 Jaske signed a Local 781 authorization card. And early in the morning of February 28 he handed out authorization cards to employees at his place of work.

On March 1 Lyon ordered Jaske to be fired.

Various Grainger witnesses testified that the sole reason for Jaske's discharge was Jaske's behavior on February 15 and the impact that that behavior had on other Grainger employees. But a fellow employee testified that Jaske's foreman said that Jaske was fired because of his union activities.

As I add up the facts of record: (1) Jaske's behavior on February 15 warranted his discharge, both because of the nature of that behavior and because of its impact on the behavior of other employees at the warehouse; (2) Jaske's discharge was in keeping with Grainger's personnel practices; and (3) the testimony of Grainger's principal witnesses seems to me to be an accurate portrayal of the events in question. I accordingly find that Grainger's discharge of Jaske did not violate the Act in any respect.

B. The Chronology of Jaske's Discharge

Jaske started working for Grainger in May 1976. Jaske appears to have been a good employee, or at least no worse than average, and had not had any disciplinary problems until the events under consideration here.

C. Jaske's Threats to the Day Shift

In March 1978 Jaske was assigned to the night shift at Grainger's Elk Grove warehouse. Jaske's shift ran from midnight to about 8:30 a.m.

At the conclusion of his shift on February 15, 1979, Jaske and a fellow employee, Dean Maretick, went out to the warehouse parking lot. While Jaske was scraping ice and snow from his car, Maretick noticed a large nail propped up against Jaske's tire. Had the nail gone unnoticed, it almost surely would have pierced the tire of Jaske's car when Jaske drove away, and there was every indication that the nail had been deliberately placed against the tire.

Jaske concluded, on the spot, that the nail must have been put there by someone on the day shift—the shift that began work at the time Jaske's shift ended. And

with the nail in one hand and his 3-foot-long ice scraper in the other, Jaske reentered the warehouse and walked at a fast pace up a ramp inside the warehouse leading to where the seven members of the day shift were gathered. As Jaske went up the ramp he yelled a variety of obscenities and threats while waving the ice scraper. Jaske did not think he had lost control of himself. But that is not how the onlookers perceived it. To them, Jaske's "very angry" expression, "bug-eyed," red face, "shouted obscenities," threats, and waving ice scraper added up to very worrisome, "crazy" behavior.⁶

The day crew had gathered near the ramp to receive orders from their foreman, Harold Dublinski. A security guard, David Millard, was nearby, as was Jaske's foreman, Norb Sadowski.

Jaske went into the middle of the circle or semi-circle formed by the day crew and, while continuing to wave the ice scraper, yelled "extremely loud" that he knew that someone on the day crew was responsible for propping the nail against the tire of his car. Jaske interspersed his curses with threats to bash in the head of the person who did it.

Dublinski and some of the other day-shift employees felt that while Jaske was indeed making threats that he was not threatening anyone in particular. But a few other day-shift workers saw the situation as one involving direct threats against them personally. And one employee had to step back in order to avoid being hit as Jaske swung the ice scraper.

When Jaske first came into the warehouse he ignored Dublinski's efforts to calm him down. But after about 3 minutes Jaske did calm down and exited the warehouse, heaving the nail against a nearby trailer as he went.⁷

D. Jaske's Meeting With Audette

At this point three things had happened of importance to discipline, security, and morale at the warehouse: (1) a nail had apparently been deliberately propped against the tire of an employee's car in the warehouse parking lot; (2) an employee, Jaske, had been badly upset by this attempted vandalism; and (3) that same employee, Jaske, had lost his head and threatened an entire warehouse shift, including a foreman. It is clear that by any usual industrial standards, including those in effect at Grainger, Jaske's behavior merited some form of discipline. But Jaske's actions immediately following his threats to the day shift had the effect of focusing Grainger management's attention on the first two aspects of the incident; namely, the vandalism and Jaske's resulting upset.

What happened was that Jaske reentered the warehouse and asked to speak to Martin Audette. Audette

was the assistant operations manager of a group of warehouses, including the Elk Grove warehouse, and as such was the most senior person in the warehouse at the time of the incident.

Audette was at the other end of the warehouse and had not witnessed Jaske's confrontation with the day shift. When Jaske got to Audette, Jaske complained about the nail and said that someone on the day crew must have been responsible for putting it under his car. Jaske was still visibly upset when he made his complaint to Audette. After stating his complaint Jaske quietly left the warehouse.

E. Reports of the Jaske Incident

Joseph Lyon is Grainger's distribution manager for operations and as such oversees the operations of Grainger's distribution center in the Chicago area, which includes the Elk Grove warehouse. While some of his subordinates have the authority to fire warehouse employees, Lyon is principally responsible for the task. Audette reports directly to Lyon. Audette telephoned Lyon immediately after he spoke to Jaske. Since Audette knew nothing of Jaske's behavior toward the day shift, the Audette-Lyon conversation focused on the vandalism to Jaske's car.

At or about the same time, Day-Shift Foreman Dublinski called his immediate superior, Wally Owen. After Dublinski described the incident to Owen, Owen told Dublinski to prepare a written report and send it to Owen.

Three written reports, along with two telephone conversations, were made of the Jaske incident: The report Owen told Dublinski to draft; a report by Audette to Lyon confirming their telephone conversation; and a report prepared by Security Guard David Millard. All three reports are part of the record.⁸

F. The Day Shift's Behavior Following the Jaske Incident

The Jaske incident triggered strong feelings of concern on the part of the day-shift employees for the safety of their own automobiles. The day shift's concern stemmed in part from a fear that the unknown culprits who tried to vandalize Jaske's car could do the same to theirs. But the day shift's major worry was that Jaske would try to retaliate. He did say, after all, that he thought that someone on the day crew had put the nail under his car's tire. That, in turn, led to a situation in which some members of the day crew spent their coffeekicks and mealtimes in their cars on the parking lot rather than, as customary, in the warehouse lunchroom. That unusual behavior (it was wintertime in the Chicago area) continued until about mid-March 1979. The day crew, in addition, voiced their concern about possible retaliation by Jaske to Dublinski. And Dublinski, on his part, asked the security guard to increase his usual checks of the parking lot. The guard, Millard, did so. (The night-shift guard, whom Millard supervised, also stepped up his surveillance of the parking lot.)

⁶ The General Counsel and the Union sought to show that the use of obscenities is routine in the warehouse in which Jaske worked. But it is clear that the way Jaske used those obscenities was far from routine. Or, as one day shift employee put it, he had heard obscenities used in the warehouse before, "but not in a fierce way, like he [Jaske] come in and said it."

⁷ Jaske's version of the incident was considerably milder than the picture portrayed by the day-shift rank-and-file employees, by Foremen Dublinski and Sadowski, and by Security Guard Millard. With minor exception I credited the testimony of the people on the receiving end of Jaske's outburst over Jaske's description of the episode where there was a conflict.

⁸ See G.C. Exh. 12, and Resp. Exhs. 14 and 16.

G. Owen's Call to Lyon

During the time period at issue Wally Owen was the warehouse manager of two of Grainger's warehouses in the Chicago area, including the Elk Grove warehouse. As such the Elk Grove foremen reported directly to him. Owen, in turn, reported to Lyon. Owen had the authority to discipline employees, including the authority to discharge them. But as a practical matter it was Lyon, not Owen, who handled discharges.

After Dublinski telephoned Owen about the Jaske incident (but before Owen had received Dublinski's written report), Owen called Lyon about the incident. By that time Lyon had already talked to Audette. Owen's call had the effect of further focusing Lyon's attention on the vandalism, on Jaske's upset, and on Jaske's feeling that someone on the day shift had been responsible for the vandalism. (Just why that happened is unclear. It could have been because Lyon, who had already heard from Audette, unwittingly influenced the course of the call, or because of some missed communication between Dublinski and Owen.) Given that focus, Lyon suggested, and Owen agreed, that there should be a meeting of the day- and night-shift employees at the Elk Grove warehouse "just to cool things down."

H. The February 16 Meeting at the Warehouse

On Friday, February 16, beginning at or about 8:20 a.m., Owen spoke briefly to the employees, telling them that he did not want any more incidents like the one on February 15. Owen then said that he thought that Jaske might have something to say and Jaske used the opportunity to apologize for his behavior on February 15. Lyon, who had gotten to the meeting just after it started, said a few words in support of Owen and said that he could understand why Jaske had become angry. Neither Lyon nor Owen said anything at the meeting that was critical of Jaske.⁹

I. Lyon Gets the Reports of Jaske's Behavior

Lyon got Audette's report on Friday, February 16. On that same day Owen forwarded Dublinski's report to Lyon. But due to the nature of the intra-Grainger mail system, Lyon did not receive the report until Monday, February 19.

Lyon also received the security office's report on the Jaske incident on February 19.¹⁰ The report Lyon received from security purported to be Millard's report. But in fact the security report had been slightly recast by one of Millard's superiors. Unfortunately for Jaske, the changes in Millard's report, albeit minor, made Jaske's behavior look even worse than did Millard's original report.¹¹ The General Counsel and the Union sought to make much of this circumstance. But the revised report was written no later than February 16. Since Jaske did

not engage in any union activity until February 27 and in fact did not even know of the Union's organizing efforts until that date, the revisions to Millard's report could not have possibly have been discriminatorily motivated. Rather, the revisions seem to reflect the security office's views on writing style, as the witnesses from the security office testified.

Lyon had been somewhat nonplussed by Jaske's apology at the February 16 meeting because, as far as Lyon then knew, there was nothing for Jaske to apologize about. The two reports that Lyon received on February 19 showed why Jaske apologized.

J. Lyon Gathers Additional Facts on the Jaske Incident—February 21 Through 27

On February 21 Lyon sent the following memorandum to Audette:

Please look into the incident regarding a nail under Jaske's tire. I have heard that Jaske made threats to day shift personnel and generally acted in a very irrational manner.

Review reports covering the incident and talk to people as you deem appropriate and we will discuss your findings. Make copies of any reports for our discussion.

I'd like to cover this ASAP.¹²

Audette responded to Lyon's request in a memorandum dated Friday, February 23. The memo arrived at Lyon's desk on Monday, February 26. It reads:

The security report, the day shift foreman H. Dublinski's report and my observations concerning the incident involving Wayne Jaske conclude that Wayne became very angry on February 15 after finding a nail propped under his car tire. He reentered the building [swinging] a wooden ice scraper, making [threats] to hurt people, using abusive language, and looking for a fight. He could not control his emotions at first, but did settle down after awhile. He seemed to [accept] the fact that our own security dept. would look into the incident. He then left the building.¹³

Audette's memorandum added little if anything to Millard's and Dublinski's reports. According to Lyon, he said this to Audette on February 27 the day after Lyon received the memorandum. According to both Audette and Lyon, Audette then verbally amplified what he had said in his February 23 report. According to Lyon's testimony, Audette mentioned that Jaske had threatened each member of the day shift, "including the foreman," and that Audette referred to the ongoing situation at the warehouse as a "precipitous situation that we really

⁹ Shortly after the February 16 meeting, Lyon wrote a memorandum for inclusion in Jaske's personnel file. See Resp. Exh. 21. The memo confirms Lyon's testimony, as outlined above, and it is clear that the memo is what it purports to be: A memorandum written by Lyon on February 16, 1979.

¹⁰ See Resp. Exh. 15.

¹¹ Compare Resp. Exh. 15 with G.C. Exh. 12.

¹² Resp. Exh. 17.

¹³ Resp. Exh. 18. Audette said that in order to prepare his report he spoke to both Dublinski and Millard. But neither Dublinski nor Millard remembered talking to any Grainger supervisor about the Jaske incident (apart from Dublinski's conversation with Owen on February 15). Dublinski and Millard could perhaps have forgotten about the brief meeting with Audette that Audette testified about. But the discrepancy does affect the weight to be accorded to Audette's testimony.

didn't want to live with." Audette's testimony was somewhat different. To begin with, he did not mention that Lyon criticized his report. Secondly, Audette said that what he told Lyon in amplification of his report was that Jaske "stormed into the building, swinging with an ice scraper and using abusive language towards the day shift employees, and he threatened to kill anybody who came close to his car."

During this same period of time Lyon and Owen had one or more conversations about the situation at the Elk Grove warehouse. Owen had checked with Jaske several times to find out if Jaske had learned anything else about how the vandalism to his car occurred. Owen remembers Jaske saying, "If I find out anything I will take care of it myself." I credit that testimony since it sounds like the kind of thing Jaske would have replied to the kind of question Owen asked.

Owen mentioned this conversation to Lyon and also testified that he spoke to Lyon of the day shift's concern about the safety of their automobiles.¹⁴

It is clear that once Lyon received Audette's memorandum confirming the reports from Dublinski and the security office—and indeed in some respects painting an even worse picture of Jaske's behavior than did the two earlier reports—Lyon was going to order Jaske to be disciplined in some manner. Jaske's behavior was, after all, seriously out of line, it did involve a foreman, and it did have a subsequent impact on the behavior of other employees at the Elk Grove warehouse. Moreover, Lyon's February 21 memorandum itself suggests that Lyon felt that Jaske's behavior on February 15 merited some form of disciplinary response. Thus, as of February 26 (the day Lyon received Audette's reply to Lyon's February 21 memorandum), the question that Lyon had to resolve was not whether Jaske should be disciplined, but what form that discipline should take.

K. Jaske's Union Activities: February 27 and 28

Late in the evening of February 27 an employee from Grainger's Bensenville warehouse visited Jaske's apartment and discussed the Union's efforts to organize Grainger. He then asked Jaske to sign an authorization card and to hand out authorization cards to other employees at the Elk Grove warehouse.

That was the first that Jaske had heard about any organizational efforts at Grainger. Jaske agreed to sign a authorization card and to hand cards out to fellow employees.

In accordance with his promise, Jaske did hand out cards to several employees during the morning of February 28. Jaske's efforts were not an enormous success, however, since two of the three employees to whom Jaske talked about the Union, Robert Lipper and Don

Parro, told Jaske that they were opposed to the unionization of Grainger's employees.

The above account of Jaske's union activities is based largely on Jaske's testimony. Jaske's account, in turn, is fully supported by documentary evidence and the testimony of other employees. Grainger argues, however, that Jaske had nothing to do with the Union until after he was fired. The basis for Grainger's argument is that the affidavit that Jaske gave to a Board investigator states that he did not engage in any organizational activities until after his discharge.¹⁵ Jaske's explanation about his affidavit is that when the Board investigator asked him about his organizational activities, he felt that the investigator was referring to distributing leaflets and the like, not handing out a few authorization cards. I credit Jaske's testimony.

L. Jaske's Discharge on March 1

1. Grainger's version

According to Lyon, the facts available to him as of February 27 added up to the need to discharge Jaske. First of all there was Jaske's behavior itself: irrational, threatening, and directed at a supervisor (Dublinski) as well as a number of rank-and-file employees. Secondly, Jaske's behavior had led to an "explosive and volatile atmosphere" in the Elk Grove warehouse "that persisted following" the incident. Thirdly, productivity was down at Elk Grove, and while there was not necessarily any connection between the Jaske incident and that below-par productivity, Lyon felt the two might be interrelated.

Lyon said that he came to the decision to discharge Jaske late in the day on February 28. He accordingly called Owen during the day on Thursday, March 1. According to both Owen and Lyon, Lyon said that he thought that Jaske should be discharged and asked Owen whether Owen agreed. Owen did agree, and Lyon told Owen to advise Jaske of his discharge before Jaske went to work that night. (Owen and Lyon testified that in any case Jaske's union activity could not have influenced their views about Jaske because neither of them knew that Jaske had engaged in any union activity.)

According to the testimony of both Wally Owen and Norb Sadowski, Jaske's foreman, Owen arrived at the Elk Grove warehouse at or about 11:30 p.m. on March 1. Owen told Sadowski that he was going to fire Jaske because of the February 15 incident. Then, when Jaske arrived at the warehouse at or about 11:45 p.m., Owen told Jaske that he was fired, referring again to Jaske's behavior on February 15.

The testimony of Owen, Sadowski, and Jaske differs slightly as to the exchange between Owen and Jaske. But in the main it appears that Jaske expressed surprise and wanted to know why Grainger had decided to fire him 2 weeks after the event in question without having previously indicated any concern. Owen responded by referring to the reports that had been submitted describing the incident.

¹⁴ Owen said that day-shift employees had talked to him about their concern. But none of the day-shift employees testified that they spoke to Owen about the problem. While the employees may simply have forgotten to mention their conversation with Owen, the discrepancy does detract from the weight that I think should be accorded to this aspect of Owen's testimony. On the other hand, the employees' behavior regarding their automobiles (taking their breaks and lunch hours out on the parking lot) was so dramatic that Owen must have become aware of it, especially since he visited the Elk Grove warehouse somewhere between once and three times a day.

¹⁵ Jaske's affidavit is in evidence as Resp. Exh. 1.

Shortly thereafter Jaske left the warehouse.

One of Jaske's fellow workers, Richard Blake, arrived at the warehouse soon after Jaske had left. When the security guard told Blake that Jaske had been fired, Blake asked Sadowski about it. According to Blake, Sadowski said that Jaske had been fired because of the nail incident on February 15. Dean Maretick (who had been with Jaske on February 15 when Jaske found the nail against his car's tire) showed up a few minutes after that. As Blake remembers it, he told Maretick that Sadowski had said that Jaske "was fired for that incident when he threatened to kill guys in the warehouse." Maretick responded, Blake testified, by saying "its got to be something else," that it "must be union activities." And later, again according to Blake, Maretick told Blake that Sadowski had said that Jaske "was fired for union activity."

The fourth night-shift employee (in addition to Jaske, Maretick, and Blake) was Robert Lipper. As Lipper remembers it, Maretick told Lipper that Jaske's discharge "was probably because of union activity" and that "Don Parro [the day-shift employee who refused to sign an authorization card that Jaske had given him] turned him." Lipper then asked Sadowski whether that was so, but, according to Lipper, Sadowski said that Jaske was fired "because of threatening somebody's life."¹⁶

As Sadowski remembers the events following Jaske's discharge, when Maretick arrived at the warehouse shortly after midnight, he asked Sadowski why Jaske had been fired. Sadowski responded by saying that Jaske had been fired for threatening other employees. Maretick did not believe it and said "there has to be some other reason." Maretick then asked Sadowski whether Jaske could have been fired for his union activities, to which Sadowski responded "what union activities," since, according to Sadowski, he had not known of any union activities among the night-shift employees.

The Union and the General Counsel urge that the testimony of Grainger's witnesses about the circumstances of Grainger's discharge of Jaske on the night of March 1 and 2 is not credible. Blake and Lipper are claimed to have shaped their testimony to fit Grainger's interests because both allegedly were very concerned about losing their jobs. Moreover, Blake is alleged to be a proven liar. As for Lyon, Owen, and Sadowski, the General Counsel argues that their claims that as of March 1 they did not know of Jaske's union activities must be presumed to be a sham. According to the General Counsel, given the small size of the Elk Grove warehouse work force and, in particular, the night shift crew of which Jaske was a member, Foreman Sadowski and then the rest of Grainger management would have promptly learned of Jaske's union activities.

2. The Union's and the General Counsel's version

The Union and the General Counsel do not dispute that Jaske was told that he was fired because of his be-

havior on February 15. Rather, they focus on the events immediately following Jaske's discharge.

According to Maretick's testimony, when he arrived at the warehouse shortly after midnight on March 2 he asked Blake where Jaske was. Blake told Maretick that Jaske was fired and that Sadowski had told Blake that the discharge was connected with Jaske's union activities. (Blake subsequently flatly denied saying any such thing to Maretick and testified that as of early March 2 Blake did not even know that Jaske was in any way connected with union activities.)¹⁷ Maretick then talked to Sadowski about Jaske's discharge. Sadowski, however, said that the discharge was because of Jaske's threats on February 15. Maretick, according to his own testimony, then returned to Blake, and Blake repeated that Jaske had been fired for his union activities, amplifying his statement to mention that Jaske had been fired for talking about the Union in the warehouse lunch room.

That led Maretick to talk to Sadowski a second time, at which time, according to Maretick, Sadowski told him that Parro and Campione, two day-shift employees at the Elk Grove warehouse, told Owen on the morning of March 1 that Jaske was spouting off about the Union in the warehouse lunch room. (Parro, Blake, and Sadowski all denied Maretick's version.)

In any event, during the morning of March 2 Maretick called Jaske and told Jaske that the real reason that Jaske had been fired by Grainger was because of Jaske's union activities.

L. Analysis, Conclusions, and Further Findings of Fact

The General Counsel and the Union argue that there are three bases for concluding that Jaske was fired for his union activities: (1) Maretick's testimony about what a supervisor, Foreman Norb Sadowski, said were the reasons that Jaske was fired; (2) the timing of Jaske's discharge—2 weeks after the alleged misbehavior but only 1 or 2 days after Jaske handed out some union authorization cards; and (3) differences in the way Jaske's discipline was handled compared to that of other Grainger employees in comparable situations.

1. Maretick's testimony

Maretick testified that, when he asked Sadowski why Jaske had been fired, Sadowski said that two antiunion employees had, the day before, told Wally Owen that Jaske had been "spouting off about the Union." Maretick also testified that Sadowski's statement was in accord with a previous conversation Maretick had had with a fellow employee, Blake, who had told Maretick that Sa-

¹⁶ While Lipper's testimony about what Sadowski said was the cause of Jaske's discharge is pertinent in respect to the Lipper-Maretick exchange, it ought not to be considered as evidence of the Company's actual reasons for discharging Jaske.

¹⁷ Blake signed an authorization card (Petitioner's Exh. 2) and testified that Jaske gave him the card. The card is dated March 1—i.e., the day before Jaske was fired. Blake said that the date was wrong and that he signed it on March 9. Blake apparently was incorrect about that date—he must have signed it at least 1 day earlier. But Blake had been out sick until March 2 and Jaske's testimony shows that Jaske did not give Blake an authorization card prior to Jaske's discharge. (In fact Jaske did not in any way deny the accuracy of Blake's testimony.) Thus, while Blake must have misremembered the date he signed the card, I credit his denial that as of the time he arrived at work on the night of March 1-2, he did not know of Jaske's connection with the Union.

dowski had said that Jaske had been fired "because he was in the lunch room talking about the union." But Blake, second night-shift employee Lipper, Sadowski, Parro (one of the employees who allegedly talked to Owen), and Lyon all controverted Maretick's testimony. I found their denials persuasive, particularly Blake's.

The General Counsel claims that Blake should not be credited in view of his lying about an authorization card that he signed and because he had made it clear to the General Counsel that he did not want to testify against his own Company. But an openly stated desire not to testify in an enforcement proceeding against one's employer is not at all same thing as a willingness to lie in favor of the employer. Moreover, Blake considered himself to be a friend of Jaske—a view not denied by either Jaske or Maretick. Maretick, on the other hand, seemed to misremember situations, recalling his own thoughts or words as the statements of the person he was talking to. And that seems to be what happened in respect to his conversations with Blake and Sadowski on March 2. Maretick liked Jaske, thought well of him, and, in general, had a close on-the-job friendship with Jaske. Given that relationship, Maretick's knowledge that Jaske had handed out authorization cards only 1 or 2 days before, and the 2-week delay between Jaske's misbehavior and his discharge, Maretick clearly was positive before he spoke to Blake and Sadowski that he knew why Jaske was fired. Under the circumstances it is not particularly surprising that Maretick ended by ignoring or forgetting what Blake and Sadowski actually said and, instead, concluded that Blake and Sadowski had confirmed Maretick's opinion about the matter.

In sum, there is no direct evidence at all that Jaske was fired for his union activities.

2. The timing of Jaske's discharge

From the point of view of Jaske or Maretick, or from the viewpoint of any other outsider, for that matter, the timing of Jaske's discharge is extraordinarily suspicious. The incident involving the nail in the parking lot occurred on the morning of February 15. For over 2 weeks no one told Jaske that he had done anything wrong or that the Company was considering disciplining him in any way. Then, a day or so after he had handed out authorization cards, he was fired, purportedly for the February 15 incident, but without any explanation about why there had been a 2-week delay in the Company's action.

But the circumstances looked very different from the point of view of the Grainger officials involved in the matter. Jaske seemed to be supported by the Company at first, rather than criticized, largely because the senior supervisor at the warehouse at the time, Audette (and, through Audette, Lyon) initially focused on what had been done to Jaske, rather than on what Jaske had done. Memorandums written by company supervisors at the time, and testimony in accord with those memorandums, make that clear.

Lyon was the senior Grainger official directly involved in the matter. His understanding of the February 15 incident changed considerably on February 19 as the result of two memorandums he received on that day. But

it is evident that because Lyon had initially viewed the matter in another light, he felt even after receiving those two memorandums that he needed more information. That is clear from a memorandum that Lyon wrote on February 21. The response to Lyon's February 21 memorandum was not written by Audette until February 23. And I credit the testimony that showed that the February 23 memo did not get to Lyon until February 26. What that adds up to is that, based on documentary evidence that cannot be seriously disputed, Lyon did not consider himself to be in a position to evaluate the February 15 incident in terms of disciplining Jaske until no earlier than February 26. And no one disputes that Jaske's first contact with the Union was on the evening of February 27. Moreover, I credit Lyon's testimony that, because he was dissatisfied with the comprehensiveness of the memo that he had received from Audette on February 26, he spoke to Audette about the matter during the day on February 27 (still prior to any contact between Jaske and the Union).

By February 27 Lyon had as much information about the February 15 incident as he was going to get. He accordingly could have ordered Jaske's discharge on that day. He did not, nor did he on February 28. But on March 1, about 48 hours after his last information-gathering conversation, and 72 hours after Lyon had received the last memorandum to be written on the matter, Lyon told Owen to discharge Jaske.

That length of time simply is not a suspiciously long period in which to make up one's mind to fire an employee. Lyon is a relatively high level Grainger official who at the time was involved in a number of matters of much larger scale than one about whether and how to discipline one hourly employee. And by the end of February a sufficient amount of time had elapsed since the incident in question for it to appear that great expedition in arriving at a decision was unimportant.

All in all, and notwithstanding initial appearances, the timing of Jaske's discharge does not indicate that Jaske was fired for anything but wholly legitimate reasons.

3. Disparate treatment

The General Counsel and the Union point to two features of Jaske's discharge that are said to be suspiciously out of character: (1) the fact that Jaske was discharged, rather than being given some lesser form of discipline (the General Counsel and the Union pointing, in particular, to incidents involving Grainger employees Ron Herman and Bob Lipper as examples of situations in which an employee threatened another employee with bodily harm or, in Lipper's case, actually struck another employee, yet received only the lightest kinds of discipline);¹⁸ (2) the delay between Jaske's misbehavior and his discharge (with the General Counsel noting that, in every case in which an employee was discharged for fighting, the discharge occurred immediately after the misbehavior or, in the very least, the employee was im-

¹⁸ For testimony about the Lipper incident see the transcript. For the evidence on the Herman incident, see generally the testimony of Terry Altman, Ron Herman, Wally Owen, Richard Wahl, Joseph Lyon, and Gerry Wentz, and G.C. Exh. 11 and Resp. Exh. 9.

mediately or nearly immediately suspended pending investigation). I have considered the evidence in this regard, but my conclusion is that it fails to suggest that Jaske's discharge was for reasons other than those stated by Grainger.

The problem is that the General Counsel and the Union fail to come to grips with the uniqueness of the Jaske incident. As several witnesses pointed out, that incident was unlike anything they had seen before at Grainger. And in terms of comparing that incident with others at Grainger, the Jaske incident was special in that it involved: (1) angry threats against an entire shift of employees and their foreman; (2) an employee who was going off duty and thus was leaving the premises on his own (obviating the need to suspend him in order to separate him from his fellow employees); (3) initial focus by management on what had been done to Jaske, rather than what he had done; and (4) a significant impact on the subsequent behavior of a group of Grainger employees. What these aspects of the Jaske incident add up to, along with the other facts discussed earlier in this Decision, is that discharge was not at all out of line with Grainger's discipline policies.

II. THE ALLEGED DISCHARGE THREAT IN VIOLATION OF SECTION 8(A)(1)

Terry Altman is, and at all material times was, a Grainger employee assigned to Grainger's Bensenville warehouse. According to Altman, sometime in November 1978 he noticed that his foreman, Harold Dublinski, was giving him "the cold shoulder." Altman testified that when he asked Dublinski about it, Dublinski said that Lyon had put out the word that Altman was to be "watched for union activity." Later that same day, again according to Altman, Dublinski told Altman that "union activity is grounds for termination" and that Altman was to see Dublinski's supervisor, Wally Owen. When Altman went to Owen's office, Owen, as Altman remembered it, told Altman that four employees had said that Altman was heavily engaged in union organizing activities, that Owen would not tolerate such activities, and that union activity was "grounds for termination."

Altman said that he responded both to Dublinski and to Owen by claiming that he was "innocent."

Dublinski and Owen both denied Altman's version of their conversations with him. Dublinski remembers that Altman did indeed ask him why he was giving Altman the "cold shoulder." But Dublinski recalled that it was Altman who asked if it was because Lyon had told Dublinski to keep an eye on Altman. Dublinski testified that he denied that Lyon had said any such thing. About half an hour after that conversation, Dublinski testified, Altman paged Dublinski and said that he had been threatened by a fellow employee for promoting the Union. When Dublinski asked Altman if he wanted to see Owen about the matter Altman said "yes." According to Owen, when he met with Altman in his office,

Altman told him only about the threat and about how much he liked working at Grainger.¹⁹

The issue resolves itself down to a straight credibility determination, and I credit Dublinski and Owen over Altman. Other testimony by Altman indicated that his perceptions were not as reliable as they might be. And the openness of Altman's union activities does not square with his recollection of the Dublinski/Owen incident. My reaction, based on Altman's demeanor, was that, while he made every attempt to testify honestly, his recollections should not be relied upon.

My conclusion, therefore, is that the General Counsel failed to prove that any Grainger supervisor threatened any employee with discharge or any other form of discipline because of the employee's protected concerted activities.

III. LYON'S AND THOMAS' INTERROGATION OF JASKE AND MARETICK

At or about 6 p.m. on July 24, 1979, Lyon and an attorney retained by Grainger, Edwin Thomas, showed up at Jaske's apartment.²⁰ Lyon and Thomas introduced themselves and Thomas asked if he could ask Jaske some questions about Jaske's union activities. Thomas persisted in the face of a negative response by Jaske. But Jaske continued to refuse to answer any questions about anything to do with the substance of this proceeding. Lyon and Thomas left after a few minutes.

Two hours later Lyon and Thomas called on Maretick at his home. As was the case with Jaske, they had not notified Maretick of their intended visit. Thomas asked Maretick about his recollection of the circumstances of Jaske's discharge and about the contents of the affidavit that Maretick gave to a Board agent. Maretick refrained from providing the kinds of information Thomas was seeking, and Thomas and Lyon left.

The General Counsel claims that this behavior by Lyon and Thomas amounted to improper interrogation in violation of Section 8(a)(1) of the Act, citing *Johnnie's Poultry*²¹ and its progeny.

The cases cited by the General Counsel all arose in connection with questioning by an employer's agent of persons who at the time of the questioning were either employees of the employer or applicants for employment. As indicated in those cases, on the one hand there is an "inherent danger of coercion" in such situations.²² But on the other hand, "there is the legitimate right of a party in anticipation of the forthcoming quasi-judicial proceeding to prepare for the employer's defense." *N.L.R.B. v. Neuhoff Bros. Packers Inc.*, 375 F.2d 372, 377 (5th Cir. 1967), *enfg.* 151 NLRB 916 (1965). The Board has accommodated these conflicting concerns by permitting an employer to question employees "concerning issues raised in [an unfair labor practice] complaint," so long as the questioning is not itself coercive in nature

¹⁹ See also Resp. Exh. 19 (April 9, 1979, memo discussing Altman's statement to Foreman Gerry Wenta that other employees were "picking" on him because of his union activity).

²⁰ Thomas represented Grainger at the hearing and on brief.

²¹ 146 NLRB 770, enforcement denied 344 F.2d 617 (8th Cir. 1965).

²² *Id.*, 146 NLRB at 774.

and does not "exceed the necessities of the legitimate purposes" behind the questioning.²³ In addition, the employer ordinarily "must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis."²⁴

In defining the area of permissible inquiry, the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent. For such questions have a pronounced inhibitory effect upon the exercise by employees of their Section 7 rights, which includes protection in seeking vindication of those rights free from interference, restraint, and coercion by their employer. Moreover, interrogation concerning employee activities directed toward enforcement of Section 7 rights also interferes with the Board's processes in carrying out the statutory mandate to protect such rights.²⁵

My recommendation is that the *Johnnie's Poultry* allegations in the complaint be dismissed.

Turning first to Thomas' questioning of Maretick, at the time of the questioning Maretick was not an employee of Grainger: he had previously quit Grainger to take a job with another company. Thus the employer's economic power over employees that generates the inherent danger of coercion was absent. Moreover, Thomas' and Lyon's behavior was amicable and they in no way suggested that Maretick's responses (or lack of responses) to their questions would help or hurt him in any manner.

Thomas' questioning of Jaske presents a closer question. Jaske was not an employee of Grainger on July 24 and had not applied to Grainger either for reinstatement or for a new job.²⁶ But the standard remedy in a case such as this one includes an order compelling the employer to reinstate the discriminatee. And a discharged employee seeking reinstatement in a Board proceeding is, obviously, a potential employee of his ex-employer. To some limited extent, therefore, in that situation an employer does hold some of the same coercive power over the discharged employee that it holds over present employees or applicants for employment. But the difference in the extent of an employer's coercive power, as between present employees or applicants on the one hand, and, on the other, ex-employees seeking reinstatement solely through the Board's processes, is considerable.

Under these circumstances the full panoply of the *Johnnie's Poultry* requirements ought not apply. And in the case of Thomas' and Lyon's questioning of Jaske: (1) it was done at Jaske's home; (2) as in Maretick's case, Thomas' and Lyon's behavior was amicable; (3) neither Thomas nor Lyon made any threats or promises; (4) the purpose of Thomas' questioning was self-evident; (5) Jaske did not in fact answer any questions concerning

the substance of his claim for reinstatement; (6) Thomas' questions appeared to be addressed to obtaining only "facts concerning issues raised" in the complaint against Grainger.²⁷

Under these circumstances, Thomas' questioning of Jaske did not violate Section 8(a)(1) of the Act.

The prehearing questioning of an alleged discriminatee by Respondent's attorney presents two problems: First, the attorney, as agent of the Employer, represents potentially coercive economic power—as just discussed. And second, a layman's responses, absent advice of counsel, to the questions of an attorney who represents a party having interests contrary to the layman-employee, may not only be damaging to the employee's interests, they may fail to accurately represent the truth of the matter.

I have considered the lawyer-versus-layman problem epitomized by Thomas' questioning of Jaske, and have also considered the fact that Thomas did not tell Jaske that his answers could be used to preclude him from obtaining the relief that he might otherwise gain as a result of the Board proceeding.

But it is far from clear that this kind of problem ought to be handled by calling Thomas' behavior an unfair labor practice. Rather, it would appear that any untoward results of attorney-versus-layman situations can ordinarily be dealt with more efficiently via evidentiary rulings at the hearing and by taking such circumstances into account when determining what weight to ascribe to statements obtained by Respondent's attorney.

IV. GRAINGER'S CLAIMS OF WRONGDOING BY THE GENERAL COUNSEL AND BY THE UNION

Grainger alleges various misconduct by counsel for the General Counsel and by Local 781, including: (1) improperly instructing Jaske not to discuss the facts of the case with Grainger's representatives; (2) seeking to dissuade Blake from testifying truthfully; and (3) improperly refusing to call Blake as a witness.

As regards Grainger's claims relating to Jaske, the circumstances Grainger refers to occurred when Lyon and Thomas made their unannounced visit to Jaske's home. Jaske responded to Thomas' requests for information by saying that "my lawyer," Roberta Brown (counsel for the General Counsel), had instructed him not to talk to Grainger's representatives. Jaske later testified that Brown had never said that she was his lawyer and that she had never instructed him to refuse to answer questions posed by Grainger representatives. Rather, Jaske stated, he answered that way because he felt under pressure from Thomas, with his response merely reflecting that pressure.

I credit Jaske.

As for Grainger's other claims of the General Counsel's and the Union's wrongdoing, again the evidence fails to provide those claims with any support.

²³ *Johnnie's Poultry*, *supra*, 146 NLRB at 775.

²⁴ *Id.*

²⁵ *Id.*

²⁶ At the time Jaske was fired he told Owen that he wanted to speak to a Grainger official about keeping his job. Owen set up a meeting between Lyon and Jaske. But the meeting never took place because Jaske did not follow up on his request.

²⁷ The General Counsel claims that the *Johnnie's Poultry* doctrine relates to any "former employees," citing *Neuhaff Bros.*, *supra*, 375 F.2d 378. But as specifically noted in the Board's Decision, that case involved a discharged employee who, prior to his interrogation, had applied for reemployment. 151 NLRB at 918, fn. 3.

V. THE REPRESENTATION CASE

Since Jaske was fired on March 1 because of his misbehavior on February 15 and not because of his protected activities, he was not eligible to vote in the May 18 election.

Grainger and Local 781 have stipulated that Robert Bocheck was not employed in the bargaining unit on the cut-off date for eligibility and that Local 781's challenge to his ballot should accordingly be sustained. The record does not disclose any ground for refusing to accept that stipulation.

CONCLUSIONS OF LAW

1. W. W. Grainger, Inc., did not discharge Wayne Jaske because of Jaske's protected concerted activities.

2. There has been no showing that any Grainger supervisor threatened an employee with discharge because of the employee's protected concerted activities.

3. There has been no showing that any Grainger supervisor or other agent unlawfully interfered with, restrained, or coerced Wayne Jaske or any other former Grainger employees in the exercise of their Section 7 rights by virtue of the manner in which a Grainger agent interrogated them.

4. The Board agent's challenge of Wayne Jaske's ballot should be sustained.

5. Local 781's challenge of Robert Bocheck's ballot should be sustained.

[Recommended Order for dismissal omitted from publication.]